(4)

DEC 2 8 2004

NO. 04-488

IN THE

Supreme Court of the United States

REBECCA CRYSTIAN, et al.,

Petitioners,

v.

TOWER LOAN OF MISSISSIPPI INC, et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY

MERRIDA COXWELL
CHARLES R. MULLINS
COXWELL & ASSOCIATES, PLLC
POST OFFICE BOX 1337
JACKSON, MS 39215
(601) 948-1600

DON BARRETT
MARSHALL SMITH
BARRETT LAW OFFICE, P.A.
P.O. BOX 987
404 COURT SQUARE NORTH
LEXINGTON, MS 39095
(662) 834-2376

DAVID ARKUSH
BRIAN WOLFMAN
(*Counsel of Record*)
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-1000

G. WAYNE HYNUM
1507 HARDY STREET
SUITE 105
HATTIESBURG, MS 39401
(601) 583-2608

Counsel for Petitioners

December 28, 2004

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

In re A.H. Robins Co., Inc.,
880 F.2d 709 (4th Cir.), *cert. denied*,
493 U.S. 959 (1989) 3

Adams v. Robertson,
520 U.S. 83 (1997) 6

Allison v. Citgo Petroleum Corp.,
151 F.3d 402 (5th Cir. 1998) 4

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 6

Bratcher v. National Standard Life Insurance Co. (In re Monumental Life Insurance Co.),
365 F.3d 408 (5th Cir.), *cert. denied*,
125 S. Ct. 277 (2004) 5

Brown v. Ticor Title Insurance Co.,
982 F.2d 386 (9th Cir. 1992), *cert. dismissed*,
511 U.S. 117 (1994) 2

DeBoer v. Mellon Mortgage Co.,
64 F.3d 1171 (8th Cir. 1995), *cert. denied*,
517 U.S. 1156 (1996) 3

Eubanks v. Billington,
110 F.3d 87 (D.C. Cir. 1997) 3

First Federal of Mich. v. Barrow,
878 F.2d 912 (6th Cir. 1989) 3

Holmes v. Cont'l Can Co.,
706 F.2d 1144, (11th Cir. 1983) 3

Jefferson v. Ingersoll International Corp.,
195 F.3d 894 (7th Cir. 1999) 2

Kyriazi v. W. Electrical Co.,
647 F.2d 388 (3d Cir. 1981) 3

Molski v. Geleich,
318 F.3d 937 (9th Cir. 2003) 2, 6, 8

Ortiz v. Fibreboard Corporation,
527 U.S. 815 (1999) 2, 9

Phillips Petroleum Company v. Shutts,
472 U.S. 797 (1985) 2, 9

Robinson v. Metropolitan-N. Commuter R.R. Co.,
267 F.3d 147 (2d Cir. 2001), *cert. denied*,
525 U.S. 951 (2002) 4, 5

Ticor Title Insurance Co. v. Brown,
511 U.S. 117 (1994) 2, 3, 5, 6, 8

INTRODUCTION

Respondents essentially concede that this case implicates a circuit split on an important issue on which this Court has twice granted certiorari. Opp. 15, 18. However, respondents misunderstand the nature, scope, and importance of the split, leading them to misapprehend the petition's focus. They believe the petition concerns the circuit split over the standards for certifying a class under various subdivisions of Rule 23 rather than the circuit split over opt-out rights. That misapprehension leads respondents to claim erroneously that this Court has previously denied certiorari on the question presented. *See* Opp. 14 & n.5. In fact, respondents identify denied petitions that challenged the propriety of class certification under Rule 23(b), but cannot cite any denied petition that concerned the grant or denial of opt-out rights for absent class members seeking substantial damages. Respondents' conflation of the two questions also renders most of their opposition brief beside the point. In the pages that follow, petitioners first explain why respondents' confusion should not divert this Court's attention from the question presented. Then, petitioners reply to respondents' specific arguments.[1]

ARGUMENT

1. Respondents essentially concede that the courts of appeals disagree on "'how much' damages claim is 'too much'"

---

[1]All citations to "Opp." are to the Brief in Opposition filed by defendants Tower Loan of Mississippi Inc., *et al.* The opposition filed by the class plaintiffs does not seriously address the legal issues presented in the petition. Rather, it primarily seeks to establish that the plaintiffs' claims are weak. Although petitioners believe that they will prevail on their individual state-law damages claims if they are allowed to opt out, the merit of those claims is wholly irrelevant to the question whether petitioners have a right to opt out to pursue them.

to permit certification without opt-out rights. Opp. 15, 18. But respondents suggest that there is only one answer to that question—that opt-out rights may be denied whenever injunctive claims "predominate" over monetary claims—and that the courts only disagree over the definition of "predominance." Opp. 18-20. Respondents are mistaken. At least two circuits hold that even when injunctive relief predominates over monetary relief, claimants seeking damages must be permitted to opt out.[2] Thus, these courts hold that a substantial damages claim is "too much" to permit the denial of opt-out rights regardless of the relationship between monetary and injunctive relief sought in the action.

In particular, the Ninth Circuit held in *Ticor* and reaffirmed in *Molski* that absent class members seeking "substantial" damages must be permitted to opt out regardless of the presence (or even predominance) of claims for injunctive relief. *See Ticor*, 982 F.2d at 392; *Molski*, 318 F.3d at 950-51. And this Court noted in dismissing the writ in *Ticor* that Rule 23(b) or the Due Process Clause may prohibit *any* certification of damages claims without opt-out rights. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 120-21 (1994) (per curiam). Similarly, the Seventh Circuit held in *Jefferson* that absent class members should be granted opt-out rights when they claim *any* damages or, indeed, "whenever possible." 195 F.3d at 899. In stark contrast, the Third, Fourth, Sixth, and Eighth Circuits have held that opt-out rights should be denied whenever possible,

---

[2] *See Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. dismissed*, 511 U.S. 117 (1994) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985)); *Molski v. Geleich*, 318 F.3d 937, 950-51 (9th Cir. 2003); *Jefferson v. Ingersoll Int'l Corp.*, 195 F.3d 894, 897-99 (7th Cir. 1999) (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846-48 (1999)).

including when absent class members seek monetary damages.[3] *See* Pet. 12-13.

Thus, respondents are wrong to imply that all courts allow certification of non-opt-out classes whenever injunctive claims "predominate" over monetary claims. Opp. 14-16. It is true that all courts permit certification of damages claims into *nominally* mandatory classes (meaning classes certified under Rule 23(b)(1) or (b)(2)) in some circumstances, although they disagree about what those circumstances are. But the Ninth and Seventh Circuits—and, at least sometimes, if not always, the Second, Eleventh, and D.C. Circuits[4]—require opt-out rights for damages claims even if they are certified under (b)(1) or (b)(2). Other courts, like the Fifth Circuit below, do not.

2. Respondents' mistake is to conflate two distinct questions: (1) whether Rule 23 or the Due Process Clause requires an opt-out right for absent class members seeking substantial damages; and (2) how to determine which subdivision of Rule 23(b) applies to class actions seeking both monetary and injunctive relief. As suggested by this Court in *Ticor*, 511 U.S. at 121, one potential answer would resolve both questions: A holding that claims for money damages may be certified only under Rule 23(b)(3), which provides opt-out rights. Absent such a holding, the two questions remain distinct. For example, even if this Court were to hold that

---

[3] *See Kyriazi v. W. Elec. Co.*, 647 F.2d 388, 393 (3d Cir. 1981); *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 728 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989); *First Fed. of Mich. v. Barrow*, 878 F.2d 912, 919-20 (6th Cir. 1989); *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995), *cert. denied*, 517 U.S. 1156 (1996).

[4] *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 166-68 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002); *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1160 (11th Cir. 1983); *Eubanks v. Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997).

damages claimants have an absolute right to opt out, the lower courts could continue to certify classes seeking both injunctive and monetary relief under any subdivision of Rule 23(b). They would simply be required to provide opt-out rights for damages claims included within properly certified (b)(1) and (b)(2) classes.[5]

As a result of their confusion, respondents focus almost exclusively on the circuit split over certification and ignore the fundamental question that the petition presents, thereby rendering most of their opposition brief irrelevant. For example, respondents argue that this case presents no conflict in authority because the circuits that disagree with the predominance test announced in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), certify (b)(1) and (b)(2) classes more liberally than the Fifth Circuit does. Therefore, respondents claim, *any* circuit would have certified this class. Opp. 20. However, by focusing on the propriety of class certification rather than the question of opt-out rights, respondents miss the crucial point of the petition: Even if every circuit would have certified the class below under a nominally mandatory subdivision of Rule 23(b), the Seventh and the Ninth Circuits, and perhaps others, *see supra* note 4, would have provided opt-out rights with respect to the damages claims.

3. Respondents' confusion is also the basis for their assertion that this Court has denied certiorari on the question

---

[5]The decision whether to certify a class under Rule 23(b)(3) or one of the other subdivisions of Rule 23(b) is significant independent of the question of opt-out rights because it also controls whether the putative class must meet the additional "predominance" and "numerosity" requirements imposed by Rule 23(b)(3).

presented.[6] It has not. The Court denied certiorari in the cases that respondents identify, but those cases presented only the certification question, not the opt-out question.

In *Monumental Life*, the petitioners sought reversal of a Rule 23(b)(2) class certification. *See Bratcher v. Nat'l Standard Life Ins. Co. (In re Monumental Life Ins. Co.)*, No. 04-27 (filed July 1, 2004). The court of appeals had affirmed the certification and had specifically instructed the district court to consider granting opt-out rights on remand. *Monumental Life*, 365 F.3d at 417. The defendants-appellants petitioned for certiorari because they wished to defeat class certification altogether—not because they wished to bind class members to a non-opt-out settlement that released money damages claims, as respondents do here. And the plaintiffs-respondents merely wanted to preserve the class certification. Neither party argued that the court of appeals erred in instructing the district court to consider permitting class members to opt out. Opt-out rights were not at issue.

In *Robinson*, the petitioner sought reversal of a decision that vacated a denial of class certification. *See Robinson v. Metro-North Commuter R.R. Co.*, No. 01-908 (filed Dec. 17, 2001). The Second Circuit had developed a test under which (b)(2) certification would likely be granted upon remand and, like the court in *Monumental Life*, it had suggested that opt-out rights might be appropriate. *Robinson*, 267 F.3d at 166-67. Again, one side favored certification, the other opposed it, and neither was concerned with opt-out rights.

In contrast to its denials of petitions that presented only the

---

[6]*See* Opp. 14 & n.5 (citing *Bratcher v. Nat'l Standard Life Ins. Co. (In re Monumental Life Ins. Co.)*, 365 F.3d 408 (5th Cir.), *cert. denied*, 125 S. Ct. 277 (2004); *Robinson*, 267 F.3d 147. (2d Cir. 2001), *cert. denied*, 525 U.S. 951 (2002)).

certification question, this Court has twice granted certiorari when presented with the opt-out question. *See Ticor*, 511 U.S. 117; *Adams v. Robertson*, 520 U.S. 83 (1997). And in *Adams*, the Court specifically noted its "continuing interest" in the question. 520 U.S. at 92 n.6.

4. Thus, the only inquiry relevant to determining whether this case properly presents the circuit split initiated more than ten years ago by *Ticor* is whether the petitioners seek "substantial" damages. Despite respondents' emphasis on injunctive relief, the class members indeed seek substantial damages.

Respondents imply that petitioners were unable to produce an example of an objector who could claim unliquidated, individualized, substantial monetary damages. Opp. 8. Petitioners could hardly be expected (let alone required) to produce such an example given that the burden of justifying a certification and settlement is on its proponents, *see generally Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and that there had been no discovery or factual development as a result of the district court's 1998 injunction against all pending (and future) state-court actions shortly after some were filed. R. 191. But, in any event, objectors' counsel explained that many of his clients had individualized claims worth thousands of dollars. R. vol. XI 285-89. And substantial evidence in the record, coupled with class counsel's own concessions, easily demonstrates that petitioners possess substantial damages claims that were abrogated by the non-opt-out class certification below. To reiterate:

- The class complaint overwhelmingly requests monetary relief. R. 513-14.
- The settlement releases all claims for damages, *i.e.*, under the now-approved settlement, petitioners have no right to pursue their individual damages

claims. R. 986-87.

- The settlement pays what it specifically terms "compensatory damages" and "punitive damages." R. 979-80.
- Class counsel conceded that 1,000-1,500 class members would likely win substantial damages if permitted to pursue state-court actions. R. vol. XI 37-38, 46-47.
- All prior settlements and verdicts in similar cases *exclusively* involved damages, and some involved tens of thousands of dollars in individualized monetary relief. R. 1095, 1748-52, 1800-01, 2008.
- Class counsel conceded that attempting to provide compensatory relief in the class settlement on a claim-by-claim basis was "unworkable," R. vol. XI 47, and a "morass," *id.* at 46-47, because class members' claims differed greatly from one another. *Id.*

See generally Pet. 3-7. Although respondents make conclusory assertions about the predominance of injunctive relief, *see* Opp. 16-17, they do not contest these basic facts establishing that many class members hold claims for substantial money damages.[7]

---

[7]Citing the testimony of one lawyer for some of the objectors, respondents also argue that objecting class members believed injunctive relief was important. Opp. 6. That argument is irrelevant for two reasons. First, regardless of the significance of injunctive relief to *some* class members, it is undisputed that at least 44% of class members would not benefit from the settlement's injunctive relief at all because they would not be repeat borrowers during the limited, five-year period of quasi-injunctive relief provided by the settlement. R. 959, 980 n.4; R. vol. XI 149-51. In other words, for a large proportion of the class, damages are the *only* potential relief. More important, the significance of injunctive relief is irrelevant to the question whether the objectors had a right to opt out with

(continued...)

5. Finally, respondents' argument that this case is a poor vehicle for deciding the question presented is unconvincing. *See* Opp. 23-25. First, respondents' attempt to distinguish this case because it was decided under Rule 23(b)(1)(A) fails. Several courts, including this Court, have noted that the same opt-out concerns apply to *any* mandatory class, regardless of whether it is certified under Rule 23(b)(1) or (b)(2). *See Molski*, 318 F.3d at 949 n.13; *Ticor*, 511 U.S. at 121. As discussed above, the question whether opt-out rights can be denied to class members who possess substantial damages claims exists regardless of whether the case can be certified under one or more "mandatory" categories of Rule 23.

Second, respondents' curious assertion that this Court should grant certiorari in a case from the Second or Ninth Circuit rather than the Fifth, Opp. 23, only undermines its opposition to this petition. Respondents are, of course, wrong to suggest that a petition's "cert-worthiness" depends on the circuit from which it arrives. And, ironically, in making the argument, respondents concede the existence of division among the courts of appeals.

Third, respondents argue that petitioners here have already received individual notice and an opportunity to participate, which is more process than is required for mandatory classes under Rule 23. Opp. 24-25. The argument begs the question whether mandatory class certification is an appropriate baseline for people who seek substantial damages. Under *Shutts*, due process requires more than notice and the opportunity to be heard; it also requires providing class members with damages

---

[7](...continued)
respect to their substantial damages claims. Petitioners do not argue that they have a right to opt out of the injunctive portion of a properly certified (b)(1) or (b)(2) action; they argue only that they have a right to opt out with respect to their damages claims.

claims an opportunity to exclude themselves from a class action. *See* 472 U.S. at 811-12.

Fourth, respondents argue that petitioners here do not deserve opt-out rights because they do not intend to pursue their claims individually, as evidenced by the fact that they joined with other plaintiffs when they sued in Mississippi state court. The assertion is both untrue and irrelevant. It is untrue because many of the petitioners have yet to file suit (as the district court enjoined them from doing so in 1998, R.191) but intend to sue individually. *See, e.g.,* Dist. Ct. Docket Entry No. 239 (Notice of Appeal of Randolph Sullivan, *et al.*, 79 petitioner-class members who have not filed suit). It is irrelevant because the point is not whether plaintiffs choose to litigate individually or collectively; it is whether they are given the choice to litigate outside a class action so that they, and not class counsel, exercise control over their claims.

Plaintiffs who join together voluntarily, even in large groups, retain their own counsel and, most important, control the fate of their own individual claims. This Court extolled the value of individual control in *Shutts* and *Ortiz* when upholding damages claimants' due process rights to opt out. And the Court should uphold that value here. In doing so, the Court will resolve an important and longstanding conflict among the circuits that, despite two prior attempts, it has previously been unable to resolve.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David Arkush
Brian Wolfman
(*Counsel of Record*)
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-7721

Merrida Coxwell
Charles R. Mullins
Coxwell & Associates, PLLC
P.O. Box 1337
Jackson, MS 39215-1337
(601) 948-1600

G. Wayne Hynum
1507 Hardy Street, Suite 105
Hattiesburg, MS 39401-4978
(601) 583-2608

Don Barrett
Marshall Smith
Barrett Law Office, P.A.
P.O. Box 987
404 Court Square North
Lexington, MS 39095
(662) 834-2376

Attorneys for Petitioners

December 28, 2004